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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

PINKETTE CLOTHING, INC., a  
 California corporation,

Case No. 15-CV-04950-SJO-AJW

CALL &  
 JENSEN  
 EST. 1981

Plaintiff,

vs.

COSMETIC WARRIORS LIMITED,  
believed to be a United Kingdom limited  
company doing business as LUSH  
HANDMADE COSMETICS, and DOES 1-  
9, inclusive,

Defendants.

**DEFENDANT'S MOTION IN LIMINE  
NO. 4 TO EXCLUDE HIBBARD AND  
ISAACSON**

Date: January 24, 2017

Time: 9:00 a.m.

Crtrm: 10C

Complaint Filed: June 30, 2015

Trial Date: January 24, 2017

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“ADR”	Alternative Dispute Resolution
“Agreement”	Mediation Confidentiality Agreement
“CWL”	Defendant Cosmetic Warriors Limited
“Hibbard”	Plaintiff Pinkette Clothing, Inc.’s expert Mr. Jonathan
“Isaacson”	Plaintiff Pinkette Clothing, Inc.’s expert Dr. Bruce Isaacson
“Pinkette”	Plaintiff Pinkette Clothing, Inc.
“Pinkette’s Experts”	Referring to Mr. Jonathan Hibbard and Dr. Bruce Isaacson collectively
“Scobie Decl.”	Declaration of Rachel Zimmerman Scobie
“Statement”	CWL’s Confidential Mediation Statement

## I. INTRODUCTION

The proposed testimony of Mr. Jonathan Hibbard (“Hibbard”) and Dr. Bruce Isaacson (“Isaacson”) (collectively “Pinkette’s Experts”) should be excluded. These experts improperly received and considered the Confidential Mediation Statement (the “Statement”) submitted by Cosmetic Warriors Limited (“CWL”) in connection with the parties’ mediation of this case. That Statement constitutes protected material pursuant to the parties’ Mediation Confidentiality Agreement (the “Agreement”) and Federal Rule of Evidence 408. CWL provided the Statement to Plaintiff Pinkette Clothing, Inc. (“Pinkette”) for settlement purposes only and the Statement was, pursuant to the Agreement, to be used only in connection with those settlement discussions. CWL did not authorize Pinkette to disclose the Statement to any other person, including Pinkette’s Experts. Such improper disclosure and use of the Statement violates both the Agreement and Rule 408. The integrity and effectiveness of the Alternative Dispute Resolution (“ADR”) process is damaged if parties cannot rely on each other’s agreement to maintain the confidentiality of information disclosed in connection with that process. Litigants cannot honestly and openly participate in ADR if they fear their confidential mediation statements, or the contents thereof, may find their way into evidence through adverse expert witnesses.

Pinkette cannot unring the bell; Pinkette’s Experts’ opinions and proffered testimony are tainted. CWL requests Hibbard and Isaacson be excluded as expert witnesses.

## II. FACTUAL BACKGROUND

Pinkette filed this action in June of 2015, seeking a declaratory judgment of, *inter alia*, no trademark infringement. (Doc. No. 1 at Section V.) Pursuant to the local rules of this Court, which encourage alternative dispute resolution (L.R. 16-15), the parties participated in private mediation. As part of that process, both parties signed the Agreement, which stated that

[n]o written or oral communication made by any party, attorney, mediator or other participant in mediation in the above-named case may be used *for any purpose* in any pending or future proceeding unless the parties, including the

mediator, so agree.

(Declaration of Rachel Zimmerman Scobie (“Scobie Decl.”) Ex. A at ¶ 1 and signature block (emphasis added).) CWL’s confidential Statement was a written communication made by an attorney in the mediation. That Statement included CWL’s assessment of the case, its litigation position, and prior settlement offers. (*Id.* at Ex. B.) It specifically stated “**PROTECTED BY RULE 408 OF THE FEDERAL RULES OF EVIDENCE**” and “**FOR SETTLEMERNT [sic] PURPOSES ONLY.**” (*Id.* at 1 (emphasis in original).)

Despite the clear prohibition in the Agreement against use for any purpose other than the mediation, Pinkette provided CWL’s Statement to its expert witnesses—Hibbard and Isaacson. Pinkette’s Experts admit this. Indeed, Hibbard’s report identifies CWL’s Statement in its list of materials reviewed, (*Id.* at Ex. C at Appendix B) and Hibbard and Isaacson both testified that they reviewed the Statement. (*See id.* at Ex. D at 33:13-23; Ex. E at 58:5-21.) Although both said they did not “rely on” the Statement in forming their opinions, (*Id.* at Ex. D at 33:13-23; Ex. E at 58:5-21), this does not cure the problem because there is no way to determine how the mediation Statement may have consciously or unconsciously shaped Pinkette’s Experts’ evaluations. (*See, infra*, Part III (citing *Irwin Seating Co. v. IBM*, No. 1:04-CV-568, 2006 U.S. Dist. LEXIS 86988, at \*10 (W.D. Mich. Nov. 29, 2006).) Moreover, the testimony concerning lack of reliance does not appear to be true. Isaacson did, in fact, cite to the Statement as support for a comment offered in his report. (Scobie Decl. at Ex. F at ¶ 53 and n.19.)

Hibbard’s and Isaacson’s consideration of CWL’s Statement is improper, violates the parties’ mediation Agreement, infects their analysis, and warrants exclusion of their testimony at trial.

### III. ARGUMENT

Pinkette provided, and Pinkette’s Experts reviewed and considered, CWL’s confidential mediation Statement. (*See, supra*, Part II.) This disclosure prejudices CWL, threatens the goals of the mediation process, breaches the parties’ Agreement, and renders Pinkette’s Experts’ opinions inadmissible.

1 First, Pinkette's Experts' review of the Statement prejudices CWL. The Statement  
 2 contained sensitive information including CWL's assessment of the case and litigation  
 3 position. And, because the information provided in the Statement is "motivated by a desire  
 4 for peace rather than from a concession of the merits of the claim, the use of these sort of  
 5 facts would be highly misleading if allowed to be used for purposes other than settlement."  
 6 *Irwin Seating Co. v. IBM*, No. 1:04-CV-568, 2007 U.S. Dist. LEXIS 10472, at \*11-12  
 7 (W.D. Mich. Feb. 14, 2007) (also stating that the confidential mediation information  
 8 provided to the expert is "inherently prejudicial" and provides an "ill-gotten advantage")  
 9 (internal quotations omitted).

10 Second, Pinkette's Experts' consideration of the Statement undermines the goals as well  
 11 as the efficacy of the mediation process. Mediation encourages parties to negotiate and  
 12 consider settlement options without the fear of incurring ramifications from participating in  
 13 settlement negotiations. *Chapter 7 Tr. of Student Fin. Corp. v. Pepper Hamilton LLP (In re*  
 14 *Student Fin. Corp.)*, No. 04-56423, 2007 U.S. Dist. LEXIS 95882, at \*5 (D. Del. May 25,  
 15 2007) ("The judicial system encourages the resolution of disputes by mediation and  
 16 settlement. It is axiomatic that the assurance of confidentiality for communications made  
 17 during the course of settlement negotiations is a critical component of the process.  
 18 Particularly, in the event that settlement discussions do not resolve the dispute, the parties  
 19 must be able to litigate their claims in the courtroom without the pall-like presence of  
 20 confidential negotiation statements influencing the arguments."). This objective is thwarted  
 21 when statements provided during the mediation process are later used by the parties for  
 22 purposes other than settlement. *Id.*; *Irwin Seating Co.*, 2007 U.S. Dist. LEXIS 10472, at  
 23 \*12. Parties are not likely to fully engage in the mediation process if they cannot rely on the  
 24 assurance that their confidential mediation statements will not later be used against them by  
 25 experts or otherwise.

26 Third, the parties' Agreement is clear. CWL's Statement was confidential and, aside  
 27 from the mediation discussions for which it was prepared, was not to be used "**for any**  
 28 **purpose** in any pending or future proceeding . . . ." (Scobie Decl. Ex. A at ¶ 1 (emphasis



1 added).) Pinkette's unilateral decision to violate the Agreement, share the confidential  
 2 Statement with Hibbard and Isaacson, and allow them to consider the confidential  
 3 Statement in preparing their expert reports cannot be condoned. This violation warrants  
 4 exclusion of Pinkette's Experts. *Chapter 7 Tr. of Student Fin. Corp.*, 2007 U.S. Dist. LEXIS  
 5 95882, at \*4-5 (excluding experts and "conclude[ing] that, in light of the parties' Mediation  
 6 Agreement and strong policy considerations favoring a confidential mediation process,  
 7 Defendants' motion should be granted. With respect to the Mediation Agreement, the Court  
 8 concludes that the language is clear on its face that statements made during the course of  
 9 mediation were not to be disclosed to third parties, including experts").

10 Pinkette's Experts cannot unlearn the information they have seen. *Irwin Seating Co. v.*  
 11 *IBM*, No. 1:04-CV-568, 2006 U.S. Dist. LEXIS 86988, at \*10 (W.D. Mich. Nov. 29, 2006)  
 12 ("The bell has been rung" and there is no way to determine how the mediation statements  
 13 may have consciously or unconsciously shaped the experts' evaluations). Their testimony  
 14 should be excluded in its entirety. *A. H. Lundberg Assocs. v. TSI, Inc.*, No. C14-1160, 2016  
 15 U.S. Dist. LEXIS 101422, at \*2, 6 (W.D. Wash. Aug. 1, 2016) (denying request for  
 16 reconsideration of decision that excluded experts who had reviewed confidential mediation  
 17 statement); *Chapter 7 Tr. of Student Fin. Corp.*, 2007 U.S. Dist. LEXIS 95882, at \*5-6  
 18 (excluding experts who considered confidential mediation submissions); *Irwin Seating Co.*,  
 19 2007 U.S. Dist. LEXIS 10472, at \*16-17 (affirming decision to exclude experts who  
 20 considered confidential mediation statement).

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**III. CONCLUSION**

For all the reasons stated, CWL respectfully requests the Court grant its motion to exclude Pinkette's experts Hibbard and Isaacson.

DATED: December 16, 2016

Respectfully submitted,

/s/Samuel G. Brooks

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